In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1863

ZIM'S FOODLINER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-59) is reported at 495 F. 2d 1131. The Board's decision and order (Pet. App. 1-31) are reported at 201 NLRB No. 141.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1974 (Pet. App. 60-61). The petition for a writ of certiorari was filed on June 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Zim's and S&O were required to recognize and bargain with the unions recognized by the predecessor-employer, Kroger.

2. Whether Zim's violated its duty to bargain with the unions representing its employees when it unilaterally reduced wage rates and working hours.

3. Whether Zim's unlawfully warned employees that it would go out of business if they continued to be represented by a union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.),* are set forth at Pet. 3-4.

STATEMENT

For several years prior to July 1971,[1] the Kroger Co. owned 57 supermarkets in the State of Wisconsin, including those at Monroe and Edgerton (Pet. App. 33). Grocery employees at Kroger's Monroe and Edgerton stores were represented by the Retail Clerks, and meat and delicatessen employees at Monroe were represented by the Meat Cutters[2] (Pet. App. 34-35). The collective bargaining agreements with both unions covered other Kroger stores as well,[3] and both contained union

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[1]All dates are in 1971 unless otherwise indicated.

[2]Retail Clerks Union Local No. 1401, and Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 444, respectively.

[3]The Retail Clerks agreement covered eleven Kroger stores, and the Meat Cutters agreement covered five Kroger stores (Pet. App. 35).

security clauses (Pet. App. 35). However, the agreements dealt with each store separately, setting different wages rates for different stores (Pet. App. 16). Moreover, although Kroger made promotional, merchandising, and layout decisions, personnel matters—such as hiring, discharge, and discipline—were handled at the store level subject to final approval by Kroger's personnel office (Pet. App. 13-14).

On July 19, Kroger executed purchase agreements with petitioners Zim's and S&O whereby Zim's would acquire the Monroe store and S&O would acquire the Edgerton store (Pet. App. 33). Zim's owner, Lowell Zimmer, had previously managed other Kroger stores (Pet. App. 10-11). Upon purchasing the Monroe store he hired all of Kroger's employees and retained the Kroger store manager in the same position with similar responsibilities (Pet. App. 35). S&O's principal owner, Paul Sanderson, had also managed another Kroger store (Pet. App. 11). In addition to his wife, son, and daughter, Sanderson hired nine of Kroger's fourteen employees and also retained the Kroger store manager (Pet. App. 35-36).

Kroger ceased all operations at both stores on July 24; Zim's and S&O opened on July 27 (Pet. App. 35). Kroger job titles were eliminated, but employees continued performing essentially the same job functions. Both stores continued Kroger's grocery, meat, and produce departmental structure, offering the same types of products to generally the same customers. The basic supermarket operation—stocking merchandise, self-service, checkout counter bagging, and payment—remained unchanged (Pet. App. 12, 47-48).

Timely union requests for recognition were refused by both Zim's and S&O (Pet. App. 36). Beginning in mid-August, Zim's unilaterally reduced employee wages and

working hours (Pet. App. 37). On three separate occasions, Zim's owner warned employees that he would close the store if a union came in (Pet. App. 39).

The Board found that Zim's and S&O were successor-employers to Kroger and hence bound by its bargaining obligation to the unions. That the purchasers succeeded to portions of Kroger's bargaining unit and exercised more localized control of supermarket operations did not, in the Board's view, require a contrary conclusion, in view of the admitted appropriateness of single store units, the separate store identities reflected in past bargaining agreements, the retention of the Kroger employees at each store, and the absence of significant changes in store operations following the transfers (Pet. App. 15-19).

Accordingly, the Board held that the refusals to bargain and Zim's unilateral reductions in wages violated Sections 8(a)(1) and (5) of the Act. The Board also held that Zim's store closure threats violated Section 8(a)(1) (Pet. App. 19-21). Zim's and S&O were ordered to bargain with the unions and Zim's was ordered to make whole its employees for losses caused by the unilateral reductions (Pet. App. 22). The court of appeals (one judge dissenting) affirmed the Board's findings and conclusions and enforced its order (Pet. App. 32-59).

ARGUMENT

1. As petitioners acknowledge (Pet. 9), the question whether the purchaser of a business must recognize and bargain with the union which represented the predecessor's employees turns on whether the " 'employing industry' retained its identity and continuity to a degree sufficient to make it reasonable that the purchaser-employer be re-

quired to recognize and bargain with an incumbent union." See *National Labor Relations Board* v. *Burns Int'l Security Services*, 406 U.S. 272, 279-281; *National Labor Relations Board* v. *Interstate 65 Corp.*, 453 F. 2d 269, 273 (C.A. 6). Accordingly, the basic question is whether the court below properly concluded that such identity and continuity was preserved here. This issue turns on an evaluation of the particular facts of this case and thus does not warrant review by this Court. In any event, the court's conclusion is reasonable in view of the facts that the separate identity of each store had been preserved in Kroger's collective bargaining agreements; the new owners retained virtually all of Kroger's employees,[4] who continued to perform the same job functions, under the same immediate supervision and other working conditions; and the new owners continued to serve Kroger's former customers at the same locations, utilizing the same facilities.

National Labor Relations Board v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (C.A. 5), and *Int'l Assoc. of Machinists, District Lodge 94* v. *National Labor Relations Board*, 414 F. 2d 1135 (C.A. D.C.), certiorari denied, 396 U.S. 889, relied on by petitioners (Pet. 9-11), are not inconsistent with the above analysis. In *National Labor Relations Board* v. *Zayre Corp.*, 424 F. 2d 1159, 1163-1164 (C.A. 5), the court noted that its holding in *Alamo* rested not solely upon the change from national to local control, but also upon a reduction in work force, contraction of operations,

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[4]Although in *Burns*, *supra*, the union's representative status was based on a Board certification, contrary to petitioners' contention (Pet. 10-11), a presumption of continuing majority status is equally valid where, as here, there was an established bargaining history following voluntary recognition. *National Labor Relations Board* v. *Frick Co.*, 423 F. 2d 1327, 1332 (C.A. 3).

and retention of only non-union predecessor employees. Similarly in *District Lodge 94, supra*, 414 F. 2d at 1138, the court emphasized that a "substantial non-discriminatory change in personnel" contributed to its finding of lack of successorship. By contrast, in the present case neither business operations nor employee complement were affected by the ownership transfers. The Board's finding that the bargaining obligation continued in these circumstances, notwithstanding the change to a local operation, accords with prior precedents. See *Interstate 65 Corp., supra*, 453 F. 2d at 272-273; *Ranch-Way, Inc.* v. *National Labor Relations Board*, 445 F. 2d 625, 627 (C.A. 10), remanded on other grounds, 406 U.S. 940; *Quaker Tool & Die, Inc.*, 162 NLRB 1307, 1311, enforced, 403 F. 2d 1021 (C.A. 6).

2. While a new employer may set its initial terms of employment, it may not, after its duty to honor the predecessor's bargaining obligation has attached, unilaterally change conditions of employment. *Burns, supra*, 406 U.S. at 295; *National Labor Relations Board* v. *Bachrodt Chevrolet Co.*, 468 F. 2d 963, 969-970 (C.A. 7), remanded on other grounds, 411 U.S. 912; *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765, 768-769 (C. A. 4). Petitioners challenge (Pet. 12-13) the Board's finding, approved by the court below, that Zim's bargaining obligation had already been established when it unilaterally reduced wages and hours several weeks after reopening. Such a determination likewise turns on the facts of this particular case and thus does not warrant further review.

In any event, the record supports the Board's conclusion. Thus, Kroger's employees were instructed to report to work for Zim's on July 27 "as if nothing had happened" (A. 85).[5] For a period of three weeks thereafter, Zim's

[5] "A." references are to the appendix to the briefs in the court below.

continued in effect the terms and conditions of employment set out in Kroger's collective bargaining agreements; it then made changes without consulting the unions (Pet. App. 52). Unlike *National Labor Relations Board* v. *Wayne Convalescent Center, Inc.*, 465 F. 2d 1039 (C.A. 6),[6] relied on by petitioners, the unilateral wage and hour reductions occurred well after Zim's had decided to continue its predecessor's retail grocery operations with the same complement of employees, and there was no suggestion that such changes were previously contemplated.

3. Petitioners contend (Pet. 13) that the "predictions" by Zim's owner that he would close the store in the event of unionization were lawful because they were not made during an active organizational campaign. The statements were made, however, at a time when Zim's was refusing requests to bargain and taking unilateral action in violation of the Act. In these circumstances, the Board was warranted in finding that they were coercive, particularly since Zim's had shown no "basis of objective fact" for its predictions. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 618.

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[6]In *Wayne*, the court found that "[i]t was not 'perfectly clear' at the time of the unilateral changes * * * that the employer was going to retain all of the predecessor's employees. There was substantial testimony * * * that * * * the new owners were going to * * * convert the premises to a 'bed and board' facility. If this occurred Wayne would need to retain but a few of Clark's employees." 465 F. 2d at 1042-1043, n. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOHN G. ELLIGERS,
Attorney,
National Labor Relations Board.

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